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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 607.

THE BRADFORD MACHINE TOOL COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO MEMORANDUM FOR THE RESPONDENT

The Memorandum for the Respondent (p. 5), filed herein, states that the Commissioner believes there is a need for definitive clarification of the scope and effect of § 732(c), and this additional case serves to emphasize the broad scope of the underlying problem. Petitioner herein urges that a Writ of Certiorari be granted in this case for the above reason and considering the following facts:

Petitioner does not contend that the Respondent has no right to make a new determination as to the right of Petitioner to § 722 relief for subsequent years under the statute. Petitioner recognizes that the Respondent has

such right, not where the facts remain the same, but where the facts with respect to the base period years, 1936 to 1939, have changed after the prior determination of the Respondent's predecessor that Petitioner is entitled to § 722 relief.

Respondent stresses in his memorandum (p. 3) that Petitioner introduced no evidence in support of its claims for relief for 1942 to 1945. This is true only with respect to evidence qualifying Petitioner initially for relief under § 722. The Petitioner did produce sufficient evidence in support of its claims for relief for 1942-1945, by reason of estoppel by the prior decision of Respondent's predecessor, by producing in evidence (1) the previous discretionary and administrative allowance of relief under § 722 and the determination of the amount of the CABPNI allowed by Respondent's predecessor for the taxable years 1940 and 1941; (2) that there was no change in the facts, with respect to the base period years 1936 to 1939 at the time of the prior determination, requiring any statutory adjustment in the CABPNI, previously allowed, in order to use it for any subsequent taxable year, pursuant to § 722(a); and (3) that the Respondent in 1952, in disregard of the discretionary and administrative decision of his predecessor, proceeded to reconsider the same evidence, as to the base period years upon which his predecessor acted and had determined Petitioner was entitled to relief under § 722, and to come to an opposite determination on the same facts.

Counsel for Petitioner does not comprehend why the Respondent, its counsel and the Tax Court do not apply the statute, § 722(a) that, after a decision that the taxpayer is entitled to relief under § 722 and the amount of its CABPNI has been determined, "the tax shall be determined by using such CABPNI, in lieu of the CABPNI otherwise determined under this sub-chapter." The

CABPNI is the basis of the excess profits credit of Petitioner for all excess profits tax payable years. The excess profits tax does not apply to the excess profits credit. It applies only to the Petitioner's income during each excess profits tax taxable year in excess of the excess profits credit. The CABPNI is the statutory amount of § 722 relief, to which the taxpayer is entitled, for each subsequent excess profits tax taxable year, so long as the facts, with respect to the base period 1936 to 1939, inclusive, upon which its determination and allowance are based, remain unchanged. Petitioner contends that the Commissioner had no authority, as a matter of law, to disregard the prior discretionary and administrative decision of his predecessor, under any Federal statute, or to review and set aside such prior decision, and that Petitioner, as a matter of law, had the right to apply and use, for each subsequent excess profits tax taxable year, its right to relief under § 722(a), previously allowed.

Respondent contends (p. 4) that the questoin is not one of res judicata, but one of the binding effect (estoppel) of the prior unlitigated administrative grant of relief for prior taxable years. Yes, it was unlitigated, because the taxpayer did not seek review by the Tax Court, Respondent's predecessor having granted in part taxpayer's application for § 722 relief at that time, and Petitioner did not wish to litigate for the balance thereof. Is this statute to be construed in accordance with a policy to promote litigation, or to the contrary? The determination of the estoppel question was made necessary, not solely by reason of § 722, but by reason of the prior discretionary and administrative decision of Respondent's predecessor, under the equitable principles of estoppel. They apply to discretionary and administrative decisions of the Commissioner of Internal Revenue, taxing commissioners, boards or offi-

cers, which are quasi judicial acts of such officers and boards acting within their jurisdiction.

Respectfully submitted,

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February 10, 1959.

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OCTOBER TERM, 1958

THE BRADFORD MACHINE TOOL COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 607

THE BRADFORD MACHINE TOOL COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT

In the Memorandum for the Respondent filed in this case, an inconsistency between the decision below and that of the Ninth Circuit in *Helms Bakeries* v. *Commissioner*, 236 F. 2d 3, was suggested. After remand of the *Helms Bakeries* case to the Tax Court, the Tax Court made additional findings and the case was again appealed to the Ninth Circuit. On February 3, 1959, the Ninth Circuit announced its opinion on the second appeal, overruling its first decision and dismissing the appeal for lack of jurisdiction under § 732(c) of the Internal Revenue Code of 1939. A copy of the opinion is printed in the Appendix, *infra*. The action of the Ninth Circuit in overruling the first *Helms Bakeries* decision eliminates any inconsistency of decisions and thus any need for review of

the question by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

FEBRUARY 1959.

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*It also eliminates the conflict of decisions pointed out in the Memoranda for the Respondent filed in *Brown Paper Mill Co.* v. *Commissioner*, No. 351, this Term, certiorari denied, 358 U.S. 906, and *Crowell-Collier Pub. Co.* v. *Commissioner*, No. 500, this Term, certiorari denied, January 12, 1959.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15,574 Feb. 3, 1959

HELMS BAKERIES, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Petition to Review a Decision of the Tax Court of the United States

Before: ORR, CHAMBERS and JERTBERG

JERTBERG, *Circuit Judge:*

This is a second appeal in a case involving determination of federal excess profits taxes for the calendar years 1943, 1944 and 1945. The decision of this Court on the first appeal appears in 236 F. 2d, page 3.

The issues presented to the Tax Court, whose decision was reviewed on the first appeal, related exclusively to the petitioner's right to relief under section 722 of the Internal Revenue Code of 1939[1] for the

[1] Sec. 722(a) reads: "In any case in which a taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used for a constructive average base period net income for the purposes of an

calendar years above stated. Petitioner was in existence during the entire base period—1936 to 1939 inclusive—and was entitled to use an excess profits credit based on income under the provisions of section 713 of the Code. The pertinent sections before the Court were 722(b)(2)[2] and section 722(b)(4).[3] Specifically, the petitioner rested its claim to the right to section 722 relief for the taxable years upon two grounds: (1) that its base period earnings were depressed by reason of a price war within the purview of section 722(b)(2), and (2) that it had increased its capacity for production and operation within the purview of section 722(b)(4). After trial, the Tax Court held that petitioner was not entitled to any relief under section 722(b)(2) or section 722(b)(4). 23 T.C. 967. This Court held on the first appeal that because of the

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excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. * * *"

[2] Under section 722(b)(2) relief is allowed if "the business of the taxpayer was depressed in the base period because of temporary economic circumstances unusual in the case of such taxpayer, or because of the fact that an industry of which such taxpayer was a member was depressed by reason of temporary economic events unusual in the case of such industry."

[3] Under section 722(b)(4) relief is allowed if "the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business. * * *" It is also provided under that section that "if the business of the taxpayer did not reach, by the end of the base period, the earning level which it would have reached if the taxpayer had commenced business or made the change in the character of the business two years before it did so, it shall be deemed to have commenced the business or made the change at such earlier time. * * *" The term "change in the character of the

provisions of section 732(c) of the Code[4] that it was without jurisdiction to pass upon the issue of relief claimed under section 722(b)(2) and dismissed for lack of jurisdiction the petition for review insofar as it related to that issue.

The petitioner sought relief under section 722(b)(4) upon the basis of a change in its capacity for operation and production occurring within the base period. The Tax Court found that "During the base period there was a change in the productive capacity of the petitioner. Lack of productive capacity was not a factor which to any appreciable extent limited petitioner's sales." The Tax Court made no finding on the issue of a change in the petitioner's capacity for operation occurring within the base period.

We held that under a fair construction of the finding of the Tax Court there was an available market in 1937 for additional production, and that in view of the evidentiary finding of the Tax Court on this subject its conclusion "Lack of productive capacity was not a factor which to any appreciable extent limited petitioner's sales" was arbitrary and contrary to its own finding. We further stated that the Tax Court should have made a finding as to whether or not, if this increase in capacity for production had been made two years earlier, a higher level of earnings would have been reached at the end of the base period, and, if so, the amount thereof. The judgment of this Court on the remand became final, and the Com-

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business" is defined in the section to include "a difference in the capacity for production or operation."

[4]Section 732(c) provides: "If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711(b)(1), (I), (J) or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Tax Court."

missioner did not seek review of our decision by petition for certiorari. The Tax Court rendered a new opinion, 28 T.C. 79, which was reviewed by the special division of the Tax Court, which concluded with the following statement: "Upon reconsideration of the same factors and the entire record, we are convinced and find that its reconstructed average base period net income would not exceed that which respondent has accorded it under section 713(f) of the Internal Revenue Code of 1939." Pursuant to that opinion the Tax Court rendered its decision that there are no refunds of excess profits taxes due to the petitioner for the tax years 1943, 1944 and 1945 under the provisions of section 722, Internal Revenue Code of 1939.

The Commissioner contended on the first appeal that this Court was without jurisdiction to entertain the first appeal because of the prohibition contained in section 732(c), and as construed in *James F. Waters, Inc.* v. *Commissioner of Internal Revenue,* 160 F. 2d 596 (C. A. 9th), certiorari denied 332 U.S. 767; *Corn Products Refining Co.* v. *Commissioner of Internal Revenue,* 215 F. 2d 513 (C.A. 2d), certiorari denied 348 U.S. 911; *Colonial Amusement Co. of Philadelphia* v. *Commissioner of Internal Revenue,* 173 F. 2d 568 (C.A. 3d); *Colorado Milling & Elevator Co.* v. *Commissioner of Internal Revenue,* 205 F. 2d 551 (C.A. 10th); *George Kemp Real Estate Co.* v. *Commissioner of Internal Revenue,* 182 F. 2d 847 (C.A. 2d), certiorari denied 340 U.S. 852; *A. B. Frank Co.* v. *Commissioner of Internal Revenue,* 211 F. 2d 497 (C.A. 5th).

The Commissioner recognizes that the "law of the case" rule would normally preclude reconsideration on this appeal of the determination made by this Court on the first appeal that this Court was not pre-

cluded by section 732(c) from assuming jurisdiction to pass upon the issue of relief claimed under section 722(b)(4). Nevertheless, the Commissioner urges us to reconsider and reexamine our prior holding on this point.

Since our decision on the first appeal the general question before us has been considered by other circuits. *Standard Hosiery Mills, Inc.* v. *Commissioner of Internal Revenue,* 249 F. 2d 469 (C.A. 4th); *The Crowell-Collier Publishing Co.* v. *Commissioner of Internal Revenue,* 259 F. 2d 860 (C.A. 2d), certiorari denied January 12, 1959; *Brown Paper Mill Co.* v. *Commissioner of Internal Revenue,* 255 F. 2d 77 (C.A. 5th), certiorari denied December 8, 1958; *The Patent Button Co. of Tennessee* v. *Commissioner of Internal Revenue,* 256 F. 2d 726; *Bradford Machine Tool Co.* v. *Commissioner of Internal Revenue,* 260 F. 2d 950 (C.A. 6th).

We have carefully reexamined the record in this case, and have reviewed our decision on the first appeal in the light of decisions cited by counsel before and after the submission of this cause. We have reached the conclusion that we were in error in assuming jurisdiction on the first appeal in respect to petitioner's claim for relief under section 722(b)(4). The "law of the case" rule does not preclude us from overruling our prior decision on being convinced that our prior holding was erroneous. *White* v. *Higgins,* 116 F. 2d 312, and cases cited therein. Our decision on the first appeal, reported in 236 F. 2d 3, is overruled insofar only as it relates to section 722(b)(4) relief. The petition for review on the present appeal is dismissed for lack of jurisdiction.

(Endorsed:) Opinion. Filed Feb. 3, 1959.

PAUL P. O'BRIEN, *Clerk.*

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